United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2153

To be argued by
SANDOR FRANKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

KAMA RIPPA MUSIC, INC.,

Plaintiff-Counterdefendant/ Appellant,

v.

MS. MELANIE SCHEKERYK,

Defendant-Counterclaimant/ Appellee.

KAMA RIPPA MUSIC, INC.,

Plaintiff-Counterdefendant,

v.

MS. MELANIE SCHEKERYK, MR. PETER SCHEKERYK, individually and d/b/a AMELANIE MUSIC,

Defendants-Counterclaimants.

On Appeal From An Order Of The United States District Court For The Southern District Of New York (73 Civ. 3789)

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

Page

CASES CITED

Page

Page

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

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-v-

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- -x

BRIEF FOR APPELLEE

This brief is respectfully submitted on behalf of appellee, Melanie Schekeryk (hereinafter "Melanie", the name she uses professionally), in opposition to the brief submitted

on behalf of appellant, Kama Rippa Music, Inc. (hereinafter "Kama Rippa").

PROCEEDINGS BELOW

Kama Rippa commenced this action against Melanie (and others) by serving a Complaint in the United States District Court for the Southern District of New York on August 31, 1973. Melanie served and filed an Answer denying the material allegations of the Complaint and asserting various counterclaims. On December 19, 1973, Melanie moved (by way of cross-motion) pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment on certain enumerated counterclaims. Oral argument on said motion was held before the Hon. Whitman Knapp on January 11, 1974. On June 17, 1974, Judge Knapp rendered a written opinion (413A* et seq.) granting summary judgment to Melanie on two counterclaims. An "Order and Judgment" pursuant to the Court's opinion was duly filed on July 19, 1974 (404A et seq.). A second "Order" was filed on July 31, 1974 denying appellant's motion to set aside or modify the Court's "Order and Judgment" (494A). Kama Rippa appeals from these orders of the District Court.**

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* The letter "A" preceded by a number designates page reference to the Joint Appendix.

** Kama Rippa's motion for a stay pending appeal was denied by both the District Court and this Court.

STATEMENT OF UNDISPUTED FACTS

The purported statement of facts in appellant's brief fails to refer this Court to, or even to mention, the undisputed facts upon which Judge Knapp granted Melanie's motion for summary judgment. Most conspicuous in this regard, appellant's brief fails to mention the clear reversion clause contained in the Songwriter's Agreement between appellant and appellee, fails to inform the Court of appellant's abuse of process in the Supreme Court of the State of New York which ultimately resulted in its loss of the copyrights at issue, and fails to advise this Court that in a companion proceeding between the parties in State Court, appellant admitted the invalidity of the position which it now takes before this Court. Accordingly, appellee respectfully sets forth the following statement of undisputed facts.

Melanie is a professional singer, songwriter, recording artist, and entertainer. On May 31, 1968, she entered into a written agreement (hereinafter "Songwriter's Agreement") with Kama Rippa*. The Songwriter's Agreement (reproduced in

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* "Amelanie Music" was also a signatory to this contract. Amelanie Music is a music publishing company jointly owned

(con't. on following page)

its entirety at 195A-200A) provided, in substance, that Melanie would deliver to Kama Rippa musical compositions composed by Melanie during the term of the agreement, and that Kama Rippa would remit royalty payments semi-annually to Melanie during the full 28-year life of the copyrights. From and after the date of the Songwriter's Agreement, Melanie did deliver musical compositions as required by the contract.

The Songwriter's Agreement provided that Kama Rippa would deliver to Melanie

> "on or about each August 15th covering the six (6) months ending June 30th, and each February 15th covering the six (6) months ending December 31st, royalty statements showing the amount of compensation due to [Melanie], accompanied by remittance for any royalties shown to be due [Melanie] by said statement." (See ¶6 of Songwriter's Agreement, 198A)

A rider to this paragraph specifically provided that:

> "The payment of royalties when due are of the essence. Accordingly, if publisher fails to account and pay royalties in accordance with

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by Melanie and her husband, Peter Schekeryk. In the Songwriter's Agreement, Kama Rippa and Amelanie Music were jointly referred to as the "Publisher" of the musical compositions covered thereunder. A second, contemporaneously executed agreement between Kama Rippa (and its affiliate), on the one hand, and Amelanie Music (and its affiliate), on the other hand, gave Kama Rippa the right to administer the musical compositions covered by the Songwriter's Agreement (145A).

this paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to [Melanie]. This provision may be specifically enforced. However, notwithstanding anything to the contrary above, if performance of Publisher's obligation under this Agreement is delayed or becomes impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not officially declared) regulation, ruling or action of any labor union or association of composers or employees affecting Publisher or the industry in which it is engaged or delays in the delivery of material and supplies, or for any similar or dissimilar reason Publisher may, upon notice to writers, suspends its obligations including its obligations to make payments hereunder for the duration of such delay, impossibility, impractability, as the case may be." (See rider to ¶6 of Songwriter's Agreement, 198A)

In 1971, disagreements between the parties resulted in litigation, which was substantially settled in May, 1971. On August 24, 1971, Kama Rippa entered into a written agreement with Melanie and others, pursuant to which it was agreed among other things, that the remaining obligations of Melanie, if any, to provide musical compositions to Kama Rippa under the Songwriter's Agreement would be deemed fully satisfied by the delivery to Kama Rippa of an additional twenty musical compositions written by Melanie, and the recording by Melanie

of three of said twenty compositions (this agreement is hereinafter referred to as the "Agreement Regarding Remaining Songwriting Obligations"* (201A-203A).

The Agreement Regarding Remaining Songwriting Obligations incorporated by reference, with respect to the twenty musical compositions delivered thereunder, the reversion clause that appears in the Songwriter's Agreement (and which is quoted above), as follows:

> "With respect to each of the aforesaid [twenty] musical compositions, Melanie Schekeryk . . . shall retain all rights granted to [her] pursuant to the Songwriter's Agreement . . ., including, without limitation, any causes of action or counterclaims that [she] may have arising out of same." (202A)

It was undisputed that Melanie duly and timely delivered these twenty compositions to Kama Rippa, and that she also recorded three of these twenty compositions and delivered these recordings to Kama Rippa (147A, 329A-330A). Nevertheless, Kama Rippa filed its Complaint in this action in the

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* The Agreement Regarding Remaining Songwriting Obligations was entered into when Kama Rippa began making inconsistent claims as to the number of musical compositions Melanie was required to deliver under the Songwriter's Agreement (see 361A-363A).

District Court alleging, in substance, that not only was Melanie required to deliver recordings of three compositions to Kama Rippa, but that she was additionally required to cause those three recordings to be commercially released on phonograph records to the record-buying public, despite the fact that no such contractual provision appears in the agreement itself; Melanie asserted that the obligation to "record" does not carry with it the obligation to "release" the recordings for commercial distribution to the record-buying public.*

Pursuant to the explicit provisions of paragraph 6 of the Songwriter's Agreement, Kama Rippa was required to remit to Melanie not later than August 15, 1973 full royalty payments for the period January 1, 1973 through June 30, 1973 for the musical compositions delivered by Melanie to Kama Rippa. Kama Rippa failed to remit to Melanie by August 15,

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* An affidavit submitted on Melanie's behalf in the District Court by an expert in the field of popular music explained that by providing Kama Rippa with recordings of the musical compositions, their commercial saleability to other performers and record companies was tremendously enhanced; and that the words "record" and "release" denote entirely different obligations in the popular music industry (365A-367A). The word "release" does not appear in the Agreement Regarding Remaining Songwriting Obligations; Kama Rippa asserted that the obligation to "record" implied the additional obligation to "release" for commercial distribution.

1973 any royalty payment for the period January 1, 1973 through June 30, 1973 (148A, 312A).

On August 23, 1973, in view of Kama Rippa's default, the American Guild of Authors and Composers (hereinafter "AGAC"), Melanie's representative, sent to Kama Rippa a registered letter demanding immediate payment of Melanie's royalties, and specifically advising Kama Rippa "Your retention of copyrights is placed in jeopardy failing immediate payment with interest" of said royalties. This demand letter was received by Kama Rippa on August 24, 1973 (205A-206a).

By virtue of this demand letter and the Rider to paragraph 6 of the Songwriter's Agreement, if Kama Rippa failed to remit full royalties to Melanie by September 24, 1973, all rights in and to all musical compositions delivered by Melanie to Kama Rippa would revert (and, as will hereinafter appear, did revert as a matter of law) automatically to Melanie. On August 31, 1973, a week after receipt of the AGAC demand letter, plaintiff commenced this action by filing its Complaint in the District Court, asserting in substance that Melanie had failed to release the three recordings for commercial distribution.

Kama Rippa was confronted with the choice of living up to its contractual obligation by paying to Melanie by September 24, 1973 the royalties which should have been paid to her not later than August 15, 1973, or losing to Melanie all rights in and to the musical compositions.* Faced with its obligation to pay royalties or to bear the legal consequences of continuing in its default, Kama Rippa thereupon engaged in a subterfuge in which it abused the legal process of the Supreme Court of the State of New York, County of New York, as follows.

Kama Rippa's Abuse of the State Court's Process

On September 18, 1973, Kama Rippa made an ex parte application for an order of attachment in the Supreme Court of

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* Kama Rippa had previously defaulted in its obligation to pay timely royalties to Melanie for the six-month royalty period previous to the royalty period now at issue, i.e., the six-month period ending December 31, 1972. However, because Melanie's demand letter protesting Kama Rippa's default for that period had been sent by AGAC to the wrong corporate entity (i.e., to Kama Sutra Music, Inc., Kama Rippa's affiliate, rather than Kama Rippa itself), Melanie's demand for reversion of the copyrights was withdrawn at that time without prejudice to Melanie's right to invoke the reversion clause if Kama Rippa defaulted in its obligation to make timely payment for any subsequent royalty period, including the royalty period now at issue. (150A-159A, 247A)

the State of New York, County of New York. In support of its ex parte application, in Special Term, Part II of that Court, Kama Rippa submitted to the issuing Judge a re-typed version of Kama Rippa's federal Complaint, in haec verba except for a change in the designation of the court and the absence of federal jurisdictional allegations (compare Federal Court complaint (137A et seq.) with State Court complaint (2A et seq.)). In addition, Kama Rippa submitted an affidavit stating that "no previous application for this relief has been made to any court or judge" (18A). Kama Rippa in its ex parte application deliberately concealed from the issuing Judge in State Court the pendency of the Federal action. Based on Kama Rippa's ex parte representations, the State Court issued an order of attachment with respect to, and caused levies to be made upon, "the monies now in the hands of Kama Rippa Music, Inc. [i.e., appellant itself] and the offices of Robert L. Casper, Esq.", who is Melanie's general counsel and who, at the time of the levy, held no money for Melanie. The order of attachment and levies were for the sum of $75,000.* (13A, 150A).

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* The Agreement Regarding Remaining Songwriting Obligations provided that if Melanie failed to "record" three compositions, Melanie "agrees to pay" $75,000 to Kama Rippa as liquidated damages, and Kama Rippa "agrees to accept such liquidated damages as full compensation and the sole remedy" for any breach by Melanie of her obligation to "record" (202A).

For numerous reasons, the order of attachment, in which Kama Rippa purported to attach itself, was a gross misuse of the State Court's process and was totally improper. Melanie promptly moved in State Court for an order vacating the order of attachment and levies thereunder.*

As will hereinafter appear, Melanie's motion to vacate the order of attachment and levies was eventually granted on the grounds that there was absolutely no legal foundation for the order of attachment. However, before the validity of the order of attachment and levies could be judicially determined, Kama Rippa undertook the second step in its artificial attempt to avoid the legal consequences of its continuing default of its obligation to pay Melanie her royalties. On September 20, 1973, the day after Kama Rippa caused levies to be made under the purported order of attachment which Kama Rippa had obtained, Kama Rippa sent to AGAC the following in response to AGAC's demand letter of August 23, 1973: a statement showing royalties due to Melanie for the period January 1, 1973 through June 30, 1973 in the amount of

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* The entire State Court proceedings are interspersed at 1A-252A. The Joint Appendix, which was prepared by appellant, does not reproduce the numerous papers submitted on those proceedings in chronological order for this Court to follow. Accordingly, the Court's attention will be respectfully directed hereafter to specific contentions made by the parties in the voluminous papers submitted in State Court. In the proceedings in State Court on Melanie's motion to vacate the order of attachment, the parties submitted affidavits and memoranda containing hundreds of pages, all of which were before Judge Knapp when he ruled on Melanie's motion for summary judgment.

$79,436, accompanied by a check for only $4,436 and a copy of the order of attachment which Kama Rippa had caused to be levied upon itself. Thus, Kama Rippa took the position that it had judicially prevented itself from payment of $75,000 in royalties.

Melanie, through AGAC, refused to accept this partial payment of approximately 5% of the royalties due her. A letter was hand-delivered on the same day by AGAC to Kama Rippa, informing Kama Rippa that Melanie refused to accept this 5% partial payment, reiterating Melanie's demand for full payment of royalties, and again informing Kama Rippa that if Kama Rippa refused to pay Melanie her royalties by September 24, 1973, all rights in and to the musical compositions would revert automatically to Melanie (234A-235A, 152A).

Despite this full and complete warning, Kama Rippa continued in its default. On September 24, 1973, the last permissible date for payment of full royalties to Melanie before automatic reversion of the copyrights to Melanie, Kama Rippa again delivered to AGAC a writer's royalty statement showing $79,436 due to Melanie, accompanied by a check for only $4,436 and a copy of the order of attachment and levies.

Again, AGAC (on Melanie's behalf) refused to accept this 5% partial payment, and so informed Kama Rippa by a letter hand-delivered to Kama Rippa on that date, repeating that all rights in the compositions would revert to Melanie if Kama Rippa's default continued beyond the thirty-day grace period (236A-237A, 152A-153A).

Kama Rippa continued in its default. By September 24, 1973, thirty days after Melanie's written demand delivered to Kama Rippa on August 24, 1973, Kama Rippa had failed to pay full royalties, having tendered instead only 5% of the royalties as above described (which Melanie refused to accept) (153A). Two days later, Melanie's counsel wrote to Kama Rippa and Kama Rippa's counsel declaring that ownership of the compositions had reverted to Melanie because of Kama Rippa's default (347A).

Kama Rippa persisted in its default. In the State Court proceedings in which Melanie had promptly moved to vacate the order of attachment, Melanie argued that Kama Rippa's action in obtaining the order of attachment was merely an attempt to create an artificial defense to Melanie's right to reversion of the copyrights because of Kama Rippa's

failure to pay her timely royalties. Kama Rippa, in plain contradiction to the position it later advanced in the District Court, admitted that it owed Melanie her royalties, notwithstanding Melanie's alleged breach of the "record" provision in the Agreement Regarding Remaining Songwriting Obligations. Thus, Kama Rippa unequivocally asserted:

> "We have in fact agreed that such royalties [i.e., the full $79,436] are due and owing and clearly stated that the only reason they were being withheld is because an Order of Attachment had been levied against them." (401A, 392A; emphasis added)

That Kama Rippa's action in obtaining the order of attachment in State Court was merely a transparent scheme to attempt to create an artificial defense to Melanie's rights to reversion was highlighted by another significant fact. Kama Rippa never complied with the order of attachment which it had obtained and which it had caused to be levied upon itself; Kama Rippa never delivered the $75,000, or even one penny, to the Sheriff pursuant to the order of attachment (368A-369A).

Finally, on November 2, 1973, Melanie's motion for an order vacating the order of attachment and levies was granted in State Court by the Hon. Jacob Markowitz, who specifically held, in a memorandum opinion:

"There was no legal foundation for the order of attachment." (238A-239A)

After Judge Markowitz declared the order of attachment to have been issued with no legal foundation, Kama Rippa transmitted to Robert L. Casper, Esq. (Melanie's general counsel, who was at the time still subject to the order of attachment, as the formal order vacating the order of attachment had not yet been signed by Judge Markowitz) a check for $79,436 payable to Melanie as payment of royalties for the period January 1, 1973 through June 30, 1973. Judge Markowitz signed the formal order vacating the order of attachment and levies on November 23, 1973. Service of the Sheriff's official release of the levy was made on Mr. Casper on November 27, 1973, who transmitted on that date Kama Rippa's royalty check to Melanie (153A-154A, 240A-243A).

Thus, although Melanie was entitled to receive a full semi-annual royalty payment of $79,436 from Kama Rippa on August 15, 1973, and although if payment was not made by September 24, 1973 all rights in and to the musical compositions would revert automatically to Melanie, Kama Rippa did not pay Melanie her royalties until November 27, 1973, more than three months late and more than two months after the expiration of the thirty-day grace period.

In the action which Kama Rippa had commenced in the District Court*, Melanie asserted the following two counterclaims based on Kama Rippa's failure to pay her timely royalties:

> as her second counterclaim, Melanie requested a declaratory judgment that all rights in and to the musical compositions delivered by Melanie to Kama Rippa had reverted to Melanie; and
>
> as her third counterclaim, Melanie requested an injunction restraining Kama Rippa from holding itself out as having any interest in the musical compositions or from collecting royalties for the musical compositions.

Melanie's motion for summary judgment on these two counterclaims was granted by Judge Knapp. It is from this decision that Kama Rippa's appeal is taken.

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* On Melanie's motion, the State Court issued an order staying all proceedings in that Court pending termination of the action in District Court.

ARGUMENT

POINT I

MELANIE'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE HER RIGHT TO REVERSION OF THE MUSICAL COMPOSITIONS WAS UNEQUIVOCAL UNDER THE EXPRESS AND UNAMBIGUOUS TERMS OF THE SONGWRITER'S AGREEMENT

Kama Rippa's brief asserts (at p. 17) that Melanie's motion for summary judgment should have been denied because "the interrelationship of the provisions of the several agreements was in dispute and presented a genuine issue of material fact." It is respectfully submitted that Kama Rippa's position is completely devoid of merit.

Kama Rippa's broad statement of the "interrelationship of the provisions of the several agreements" clouds the issue which Kama Rippa is attempting to raise. Melanie is alleged by Kama Rippa to have breached only one alleged obligation under any agreement between herself and Kama Rippa or any affiliate of Kama Rippa: her alleged obligation to "release" for commercial distribution three compositions which she "recorded"; as noted supra, pages 6-7, the required number of musical compositions were delivered to Kama Rippa and were recorded, and the recordings were in fact delivered to Kama Rippa. Judge Knapp held that whether the word "record" means

"record and release" is an "ambiguity [which] will require consideration of trade practices and the parties' understanding of the words used. This, in turn, will require an evidentiary hearing." (422A) (Kama Rippa does not contest this holding.) The real issue raised, as Judge Knapp stated, was whether Melanie had an absolute right under the undisputed facts of this case to timely payment of royalties, even if her obligation to "record" three musical compositions carried with it an alleged implied obligation to release the three recordings commercially for public distribution.* Judge Knapp properly held that Melanie had such a right to timely payment of her royalties.

Melanie's right to timely payment of royalties, and to reversion of the copyrights if Kama Rippa failed to make timely payment, was expressed in the Rider to paragraph 6 of the Songwriter's Agreement in language which was clear, unambiguous, and unconditional:

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* At the time Melanie was alleged by Kama Rippa to have been required to "release" the three recordings, Melanie was and had for several years been under an exclusive recording contract with Paramount Records; Kama Rippa's record-company affiliate, Buddah Records, Inc., had released Melanie in 1971 from all further recording obligations, in exchange for a $500,000 payment from Paramount to Buddah (331A, 46A).

> "The payment of royalties when due are of the essence. Accordingly, if publisher fails to account and pay royalties in accordance with this paragraph and such failure and default continues following thirty (30) days written notice of such failure and default, this agreement shall terminate and all rights in and to the compositions theretofore covered shall revert to [Melanie]. This provision may be specifically enforced." (See Rider to ¶6 of Songwriter's Agreement, 198A).

Significantly, Kama Rippa's brief in this Court does not quote this language, and does not even mention the existence of this clause.

Under the clear language of paragraph 6, Kama Rippa was required to remit full payment of royalties to Melanie for the period January 1, 1973 through June 30, 1973 not later than August 15, 1973; under the reversion clause, failure to remit full royalties to Melanie by September 24, 1973 (i.e., 30 days after the written demand of August 24, 1973) resulted in the automatic reversion to Melanie of the musical compositions. These provisions are clear and unambiguous. The simple fact is that the parties expressly and unambiguously agreed that royalties for the period January 1, 1973 through June 30, 1973 would be paid to Melanie by Kama Rippa not later than August 15, 1973, and the parties further agreed, expressly and

unambiguously, that if Kama Rippa failed to pay on time and continued in its default for 30 days after written demand, the copyrights would revert to Melanie. There was no ambiguity or doubt as to the meaning of these provisions.

It is well-established law in New York* that the construction of a written contract which is clear and unambiguous in its terms involves only a question of law, and is a matter for the court to determine as a matter of law from the written terms themselves; the parties to such a contract are conclusively presumed to have expressed their intent by the language used, and evidence of a party's subjective intent or of industry custom is irrelevant and inadmissible under the parol evidence rule. Hartigan v. Casualty Co. of America, 227 N.Y. 175 (1919); West, Weir & Bartel, Inc. v. Mary Carter Paint Co., 25 N.Y.2d 535 (1969); Wilson Sullivan Co., Inc. v. Int. Paper Makers Realty Corp., 307 N.Y. 20 (1954); Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456 (1957); General Phoenix Corp. v. Cabot, 300 N.Y. 87 (1949); Heller & Henretig, Inc. v.

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* Erie Rd. Co. v. Tompkins, 304 U.S. 64 (1938). The Songwriter's Agreement expressly provided for interpretation and construction in accordance with New York law (200A).

3620 - 168th St., Inc., 302 N.Y. 326 (1951); Bayside Federal S. & L. Ass'n v. Cord Meyer Dev. Co., 28 A.D.2d 866, 281 N.Y.S.2d 893 (2d Dept. 1967), aff'd 20 N.Y.2d 822; Kennedy v. Rolfe, 174 A.D. 10, 160 N.Y.S. 93 (1st Dept. 1916); Albany Discount Corp. v. Basile, 32 A.D.2d 723, 300 N.Y.S.2d 464 (3d Dept. 1969).

Indeed, Kama Rippa's counsel admitted that the relevant contractual provisions were unambiguous in this regard; in unsuccessfully arguing for the admissibility of parol evidence* concerning the subjective intent underlying the Songwriter's Agreement and the alleged custom in the industry, Kama Rippa's counsel stated: "a party may show that the design and object of an agreement was different from what the language, if alone considered, would indicate." (434A). This asserted proposition of law, advanced by Kama Rippa without the citation of any legal authority, contradicts the law in New York, as the above-cited cases clearly show.

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* The Songwriter's Agreement expressly provided that the agreement set forth the entire understanding between the parties and could not be changed orally (200A). This provision is binding upon the parties. N. Y. General Obligations Law, §15-301.

POINT II

THE UNAMBIGUOUS PROVISION OF THE REVERSION CLAUSE GRANTING MELANIE THE RIGHT TO TIMELY PAYMENT OF ROYALTIES OR REVERSION OF THE COPYRIGHTS IS EMPHASIZED BY REFERENCE TO OTHER CONTRACTUAL TERMS

For the reasons set forth in Point I (above), it is respectfully submitted that no ambiguity exists as to Melanie's unconditional right to timely payment of royalties. Reference to other contractual terms binding upon the parties further confirms Judge Knapp's holding that as a matter of New York law Melanie's right to timely payment of royalties was an unconditional right not dependent upon Melanie's alleged obligation to release the three recordings.

1. The expression of one circumstance (not applicable here) under which Kama Rippa could permissibly withhold payment of royalties in the event of a breach by Melanie excludes the existence of any other permissible circumstances.

In the Songwriter's Agreement as originally drafted, Melanie warranted that the musical compositions she would deliver would be original and could be the subjects of proper copyrights (Songwriter's Agreement, ¶2(b), 196A). Kama Rippa agreed to furnish accountings and pay royalties on a prescribed schedule (Songwriter's Agreement, ¶6, 198A).

Melanie agreed to reimburse Kama Rippa for damages and expenses if her warranties of originality of the compositions were successfully attacked (Songwriter's Agreement, ¶2(c), 196A). Kama Rippa was given the specific right to withhold payment of royalties pending resolution of any third-party attack upon the copyrights (Songwriter's Agreement, ¶10(a), 199A). This is the only circumstance set forth in either the Songwriter's Agreement or the Agreement Regarding Remaining Songwriting Obligations in which a breach of any covenant by Melanie would permit Kama Rippa to withhold royalty payments. And a Rider to the Songwriter's Agreement, executed at the same time as the Rider to paragraph 6, provided that by posting a bond Melanie could even require the prompt payment of royalties in the event of third-party attacks against the compositions (196A).

"The rule expressed in the maxim expressio unius est exclusio alterius, that is, that the expression of one thing is the exclusion of others, is applied in the construction of contracts. Thus the expression of one cause for the forfeiture of a right excludes the idea of forfeiture for any other cause." Encyclopedia of New York Law, Contracts, §835; O'Neil v. Van Tassel, 137 N.Y. 297, 300, 301 (1893) ("The statement that the northerly wall of one of the houses is a party wall by the force of the expression used very clearly

signifies that the other walls are independent structures"; under any other interpretation, "the use of the phrase is entirely meaningless and superfluous"); United States Illuminating Co. v. Fisk, 29 N.Y.S. 154, 78 Hun. 328 (1st Dept. 1894); Illinois Central Rd. Co. v. Gulf, Mobile & Ohio Rd. Co., 191 F.Supp. 275 (E.D.La. 1961), aff'd 308 F.2d 374 (5th Cir. 1962); York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 796 (5th Cir. 1971); Southern Coast Corp. v. Sinclair Refining Co., 181 F.2d 960 (5th Cir. 1950); Portland Web Pressmen's Union v. Oregonian Pub. Co., 188 F.Supp. 859, 865 (D.Ore. 1960), aff'd 286 F.2d 4 (9th Cir. 1960), cert. denied 366 U.S. 912.

In the instant case, the Songwriter's Agreement specifically provided for the one instance of a possible breach by Melanie under which Kama Rippa would be entitled to withhold royalties: a third-party attack against Melanie's covenant of originality. To the contrary, the only sanction provided in the event that Melanie was alleged by Kama Rippa to have breached her obligation to "record" three compositions was that "for each recording she fails to make, Melanie Schekeryk agrees to pay Twenty-Five Thousand ($25,000) Dollars to Kama Rippa Music, Inc., or its designee or assignee, or a total of Seventy-Five Thousand ($75,000)

Dollars if she records none of the [compositions], as liquidated damages. Kama Rippa Music, Inc. agrees to accept such liquidated damages as full compensation and the sole remedy for any failure by Melanie Schekeryk to record [the three] musical compositions." (202A).

This express language provides that Melanie, if she breached her obligation to "record" three compositions, is "to pay", and Kama Rippa is "to accept" the specified sum, and that this is Kama Rippa's "sole remedy"--not that Kama Rippa may "withhold" Melanie's royalties; this provision stands in sharp contrast to the language permitting Kama Rippa to withhold royalties if Melanie was alleged to have breached her warranty of originality. Indeed, Kama Rippa has unequivocally recognized and admitted that it had no right to withhold Melanie's royalties under the circumstances in this case (see infra, pp. 39-42). If Kama Rippa were entitled to withhold Melanie's royalties if Melanie were alleged to have breached any contractual obligation, including her obligation to "record", then the contractual clause specifically giving Kama Rippa the right to withhold royalties in the event of an attack on the copyrights would have been superfluous and completely meaningless.

2. The fact that Melanie's right to reversion of the copyrights in the event of Kama Rippa's failure to pay timely royalties is contained in a rider entitles it to precedence over any right of Kama Rippa

The Songwriter's Agreement as originally drafted obligated Kama Rippa to render accounting statements and payments at a prescribed schedule (Songwriter's Agreement, ¶6, 198A) and required Melanie to deliver sixty musical compositions over three years. The Agreement Regarding Remaining Songwriting Obligations defined Melanie's remaining delivery obligations under the Songwriter's Agreement. The Songwriter's Agreement as originally drafted did not give Melanie's right to receive timely royalties any preference over Kama Rippa's right to delivery of the compositions, termed Melanie's obligation to deliver "of the essence",* and contained no sanction whatever against Kama Rippa in the event Kama Rippa defaulted in its obligation to pay Melanie her royalties on time.

The Rider to paragraph 6 (198A) radically changed this. It provided that Melanie's right to an accounting and

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* The Agreement Regarding Remaining Songwriting Obligations did not classify Melanie's obligations thereunder as being "of the essence".

timely payment of royalties was "of the essence"; it further provided that continued failure to render timely accountings and royalties for thirty days after written notice would result in reversion to Melanie of all rights in and to the compositions delivered by Melanie to Kama Rippa, and that Melanie's right to reversion of the compositions was specifically enforcible; and it further provided that timely payment could be excused only by such events as "acts of God".

Under these circumstances, it is well-established law in New York that the provision in the Rider which designated Melanie's right to timely payment of royalties as being "of the essence" and which further provided for reversion to her of the copyrights if Kama Rippa failed to pay her royalties on time is entitled to dominance by virtue of the fact that Melanie's rights are set forth in a Rider. Chadsey v. Guion, 97 N.Y. 333 (1884); United States v. Certain Parcels of Land, 102 F.Supp. 854, 857 (S.D.N.Y. 1952), aff'd sub nom. United States v. Knickerbocker Printing Corp., 212 F.2d 894 (2d Cir. 1954), cert. denied 348 U.S. 875; Kratzenstein v. Western Assurance Co., 116 N.Y. 54 (1889); Amsdell v. Cherry Gas & Oil Co., 145 N.Y.S. 825 (S.Ct. 1913); Collins v. Knuth, 51 A.D. 188, 64 N.Y.S. 549 (2d Dept. 1900); Feldman v. Fiat Estates, Inc., 268 N.Y.S.2d 949, 25

A.D.2d 750 (2d Dept. 1966); Burdines, Inc. v. Pan-Atlantic Steamship Corp., 199 F.2d 571 (5th Cir. 1952).

3. The parol evidence offered by Kama Rippa would have varied the parties' contractual terms, and was for that and other reasons properly held to be inadmissible

Kama Rippa, in support of its motion for reargument after the District Court had rendered its Opinion and filed its "Order and Judgment", submitted for the first time affidavits relating to the parties' alleged "intention" and alleged industry "custom". Because the allegations contained in those affidavits would have varied the express contractual terms agreed to by the parties, the Court properly held them inadmissible under the parol evidence rule; as the Court noted, the affidavits were "based upon assertions that the contract does not mean what it says" (494A).

> "The general principle known as the 'parol evidence' rule is that where the parties to a contract have deliberately put their entire engagement in writing in such terms as to import a legal obligation without any uncertainty as to the object and extent of such engagement, extrinsic evidence of prior or contemporaneous conversations, statements, or declarations tending to substitute a contract different from that evidenced by the writing is inadmissible, since all agreements which would be shown by such extrinsic evidence are conclusively presumed to have

been merged in the writing. Briefly stated in terms of the result of the application of the rule, a valid instrument clear in its terms and purporting to express the entire agreement of the parties cannot be contradicted, varied, or explained by what was said between the parties either prior to or at the time of the execution of the instrument . . . .

"The 'parol evidence' rule which denies effect to an oral agreement contradicting a written contract entered into at the same time or later, is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties, which, when applicable, defines the limits of the contract. Indeed, the parol evidence rule has been described as an important principle of substantive law designed to permit a party to a written contract to protect himself against perjury, infirmity of memory, or the death of witnesses, and while its application may on occasion seem to work injustice, on the whole it works for good . . . .

"The parol evidence rule . . . renders inadmissible evidence as to what the parties to a written contract understood, or what they intended, where it contradicts or varies the clear and unambiguous terms of the instrument." 22 N.Y. Jur., Evidence, §§ 597, 598, 615.

Kama Rippa's counsel, in support of Kama Rippa's motion for reargument, asserted that "a party may show that the design and object of an agreement was different from what the language, if alone considered, would indicate." (434A). This assertion was made without citation of any legal authority, and flatly contradicts well-settled New York law (see supra,

pp. 20-21). Kama Rippa submitted affidavits to the general effect that it was not intended under the Songwriter's Agreement that the copyrights would revert to Melanie under the circumstances present here. An examination of Kama Rippa's affidavits reveals that they directly contradict the express reversionary clause of the Songwriter's Agreement. The affidavit of Kama Rippa's president stated that "When I agreed to the contents of the rider to paragraph 6, I did not intend, nor did I understand, that if payments were not made on a specific date, and regardless of any injuries suffered by Melanie, all copyrights would revert to her" (444A). The affidavit of Kama Rippa's vice-president and general counsel similarly stated that paragraph 6 of the Songwriter's Agreement, and the Rider thereto, "were not intended to imply that payments had to be made on a specific date", and further stated that "it was never intended by me to mean that the failure to pay money on a specific date would precipitate a reversion of copyrights" (459A). These assertions clearly contradict the terms of the Songwriter's Agreement. Moreover, Kama Rippa's affidavits did not proffer evidence of a single act or statement upon which to support its alleged "intention" in agreeing to the Rider to paragraph 6 of the Songwriter's Agreement; to the

contrary, the affidavit of Kama Rippa's vice-president and general counsel expressly stated that the issue of whether the reversion clause contained in the Rider to paragraph 6 was to be conditional upon Melanie's satisfaction of her obligation to deliver musical compositions was never even discussed by the parties (458A).

Kama Rippa's affidavits with respect to alleged "customs" in the popular music industry were properly excluded by the Court for similar reasons.

> "[P]roof of general custom or usage * * * may not be interposed to alter, vary or contradict unambiguous contractual provisions or modify or change legal obligations assumed by the parties under their contract." Albany Discount Corp. v. Basile, 32 A.D.2d 723, 724, 300 N.Y.S.2d 464, 466 (3d Dept. 1969)

An examination of the affidavits proffered by Kama Rippa supports the Court's ruling. Kama Rippa submitted affidavits from three alleged "experts" in the field of popular music (each of whom disclaimed any knowledge of the facts of this case), each of whom stated that it would be difficult for a music publishing company such as Kama Rippa to render accountings and royalties within forty-five days of the close of a given royalty period (473A, 478A, 483A) (as Kama Rippa was expressly required

to do under the Songwriter's Agreement). Each "expert" also stated, in identical language, that in the music business "no one would ever construe the failure to pay money on a specific date as precipitating a reversion of copyrights." (473A, 478A, 483A). However, this is precisely what was provided for in the Rider to paragraph 6 of the Songwriter's Agreement, in direct contradiction to this alleged industry practice. Moreover, the affidavits of Kama Rippa's "experts" was inadmissible for another reason: none of them even purported to render an opinion as to general industry custom in interpreting a contract containing a reversion clause such as in the instant case; rather, their affidavits tended at best to describe the terms of songwriting agreements generally entered into in the music field. In the instant case, however, the parties entered into a specific agreement to which they were contractually bound even if such an agreement were not the norm in the industry. In all the affidavits submitted on Kama Rippa's behalf, there was no suggestion that there is any ambiguity in the music industry or anywhere else as to what the word "reversion" means or any other word in the contract. Whether or not it is standard practice in the music industry to include a reversion provision in a songwriter's contract, the

undisputed fact remains that in the Songwriter's Agreement at issue in this case, these provisions were specifically and unmistakably agreed to by the parties.

In summary, the provision in the Songwriter's Agreement requiring Kama Rippa to pay Melanie her royalties on a prescribed schedule, and the Rider providing for reversion of the copyrights to Melanie if Kama Rippa failed to pay timely royalties, were expressed in clear and unambiguous terms. Kama Rippa does not allege that there is any ambiguity in any word used in the contract, including the word "reversion". Judge Knapp explicitly recognized Kama Rippa's right to determination of ambiguous words by a trier of facts in holding that resolution of the ambiguity of the word "record" as used in the Agreement Regarding Remaining Songwriting Obligations "will require an evidentiary hearing." (422A).

Kama Rippa challenges as ambiguous the language of only one phrase. The Rider to paragraph 6, after providing for reversion of the copyrights to Melanie in the event of Kama Rippa's default, provided an excuse for that default under the following limited circumstances (which are set forth in the Rider to paragraph 6 immediately following the reversion provision):

> "However, notwithstanding anything to the contrary above, if performance of Publisher's obligation under this Agreement is delayed or becomes impossible or impractical by reason of any act of God, fire, earthquake, strike, labor disturbance, civil commotion, acts of government, its agencies or officers, any order, war (whether or not officially declared) regulation, ruling or action of any labor union or association of composers or employees affecting Publisher or the industry in which it is engaged or delays in the delivery of material and supplies, or for any similar or dissimilar reason Publisher may, upon notice to writers, suspends [sic] its obligations including its obligations to make payments hereunder for the duration of such delay, impossibility, impractability [sic], as the case may be." (198A)

Kama Rippa's brief (at p. 27) claims that the phrase "for any similar or dissimilar reason" "is susceptible to and permits at least one rational meaning which the Court should have considered, i.e., non-performance of other contractual obligations". However, under the interpretation advanced in Kama Rippa's brief, the phrase in question would completely obliterate Melanie's right to prompt payment of royalties, as Kama Rippa could avoid its obligation for the "reason" that it simply did not wish to pay Melanie her royalties on time. Read in context, however, the contractual clause permitted the suspension by Kama Rippa of royalty payments only if Kama Rippa's performance "is delayed or becomes impossible or impractical" by reason of conditions such as those enumerated, and was to be permitted only "for the duration of such delay, impossibility,

impractability [sic], as the case may be." Thus, the clause clearly requires that the contingency, in order to excuse non-payment of royalties, must be of a nature beyond Kama Rippa's power to control.

> "Contracts often contain clauses absolving a party from liability for nonperformance in the event of certain contingencies, such as fires, floods, strikes, etc. . . . In order for a party to be excused from performing by such a clause, the excuse must not only be one coming within the terms of the clause but it must have been one reasonably beyond the power of the party to prevent. In other words, such a clause will not give a party the power arbitrarily to refuse performance, but he is under a duty to exercise a reasonable amount of care to prevent the happening of the contingency named." 10 N.Y.Jur., Contracts, §358.

Kama Rippa surely did not exercise any care whatsoever to attempt to live up to its contractual obligation, and its default is not excused by the existence of the order of attachment which Kama Rippa caused to be levied upon itself (see infra, Point V).

The District Court's holding was also proper under the "well-settled rule that 'where certain things are enumerated, and such enumeration is followed or coupled with a more general description, such general description is commonly understood to cover only things ejusdem generis with the particular things mentioned.'" Krulewitch v. National Importing & Trading Co., Inc., 195 App.Div. 544, 186 N.Y.S. 838, 839 (1st Dept. 1921); cf. Bers v. Erie R.R. Co., 225 N.Y. 543, 546 (1919) ("When a

particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words are restricted to those of the same kind (ejusdem generis)."); Hickman v. Cabot, 183 F. 747, 749 (4th Cir. 1910) ("To our minds the words 'other cause' must be limited to causes of the same general nature as are fire and explosion, the causes of shutting down [the defendant's business] specifically mentioned. They cannot be held to include a shutting down directed by the defendant for his own profit or convenience."); Davids Co. v. Hoffmann-LaRoche Chemical Works, 178 App.Div. 855, 858 (1st Dept. 1917); Meade v. Poppenberg, 167 App.Div. 411, 414, 153 N.Y.S. 182, 184 (4th Dept. 1915). In the instant case, the clause in question relates unquestionably to Kama Rippa's default under circumstances beyond Kama Rippa's ability to control, which is clearly not the case here (see infra, Point V).

To interpret the phrase as Kama Rippa suggests would be to render completely meaningless Melanie's right to prompt payment of royalties. Under these circumstances, the District Court was clearly right in holding "that, in the context, no rational meaning can be given" to the phrase, and that "it should be ignored." (423A, fn. 5). See Zim Israel Nav. Co. Ltd. v. Sealanes Internat'l, Inc., 17 App.Div.2d 393, 395, 235

N.Y.S.2d 296, 299 ("It will not be held the parties intended to engage in a useless or futile act."); New York Central Railroad Co. v. New York, New Haven & Hartford Railroad Co., 208 N.Y.S.2d 605, 616 (Sup.Ct. 1960), mod. on other grounds 13 App.Div.2d 309, 216 N.Y.S.2d 928, aff'd 11 N.Y.2d 1077 (1962); Auerbach v. Foster's Place, Inc., 220 N.Y.S. 281, 285, 128 Misc. 875, 878 (Mun.Ct. 1927) ("[I]n giving effect to the general meaning of a writing, particular words are sometimes disregarded or supplied."); Kister Oil Development Corp. v. Young, 27 F.2d 433, 437 (W.D.Ky. 1928).

Finally, it is most significant that nowhere in the record below did Kama Rippa suggest that the parties intended by the phrase in question to excuse Kama Rippa from paying Melanie her royalties on time if she allegedly breached her obligation to "record" three compositions. If this had been the parties' intention in including this phrase, Kama Rippa's "witnesses" would surely have so asserted in their affidavits opposing Melanie's motion for summary judgment. Yet the record is completely devoid of any statement as to the parties' intention in using the phrase which Kama Rippa now seizes upon; in the Court below, Kama Rippa offered no extrinsic evidence on this issue. Accordingly, the Court's holding against Kama Rippa on Melanie's motion for summary judgment was plainly correct, as nothing was presented to the Court except the written contract for the Court to use in construing the phrase.

POINT III

EVEN IF THE CONTRACTUAL TERMS HAD BEEN AMBIGUOUS AS TO MELANIE'S UNCONDITIONAL RIGHT TO TIMELY PAYMENT OF ROYALTIES, MELANIE AND KAMA RIPPA HAVE BOTH INTERPRETED KAMA RIPPA'S OBLIGATION TO PAY MELANIE HER ROYALTIES ON TIME AS BEING AN UNCONDITIONAL OBLIGATION NOT DEPENDENT ON MELANIE'S "RECORDING" OF THREE COMPOSITIONS, AND KAMA RIPPA IS BOUND BY THAT INTERPRETATION

For the reasons set forth above, it is respectfully submitted that there was no ambiguity in Kama Rippa's unconditional obligation (with the exception, irrelevant here, of attacks on the copyrights) to pay Melanie her royalties on time. Moreover, even if there had been any ambiguity, it is well-established law in New York, as set forth in numerous decisions of the New York courts and as recognized by this Court, that where a party has unmistakably interpreted an ambiguity in a contract against its own interest, that interpretation will be adopted by the court. Dworsky v. Herstein, 207 A.D. 333, 335, 202 N.Y.S. 72, 73 (1st Dept. 1923) ("With this ambiguous contract the practical interpretation of the parties is, I think, conclusive upon them."); Porter v. Penna. R. Co., 217 A.D. 49, 52, 215 N.Y.S. 727, 732 (4th Dept. 1926) ("The practical construction of a contract by the parties themselves is always entitled to great weight and may, under certain

circumstances, become conclusive."); Simadiris v. Hotel Waldorf Astoria Corp., 144 N.Y.S.2d 136, 138 (S.Ct. 1955) ("The practical construction of the parties is controlling."); Battista v. Carlo, 293 N.Y.S.2d 227, 57 Misc.2d 495 (S.Ct. 1968); In Re Field's Will, 204 N.Y.S.2d 947, 11 A.D.2d 774 (2d Dept. 1960); Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc., 178 F.Supp. 655, 667 (S.D.N.Y. 1959), aff'd 280 F.2d 197 (2d Cir. 1960) ("The courts will follow the interpretation placed upon the contract by the parties themselves as shown by their acts and conduct."); Weagent v. Bowers, 57 F.2d 679 (2d Cir. 1932) ("When there is ambiguity in the terms of a contract the practical construction which the parties have put upon it is entitled to great if not controlling influence . . . In the present case their interpretation should control . . ."); City of New York v. New York Ry. Co., 193 N.Y. 543 (1908); Stewart v. Barber, 43 N.Y.S.2d 560, 564, 182 M. 91, 94 (S.Ct. 1943) ("The Courts give, and should give, great and often controlling consideration to the construction which parties to a contract have themselves placed upon it.") (emphasis added).

In the instant case, Kama Rippa has admitted in its statements and by its actions that Melanie's right to receive timely payments of royalties was independent of her alleged

obligation to commercially release the three recordings.* All of these statements and actions were made by Kama Rippa after Melanie had allegedly breached her alleged obligation to commercially release the three recordings. Kama Rippa's interpretation of the unconditional nature of its obligation to make timely payment of royalties to Melanie, and its admissions in word and deed to that effect, were the following:

a) In opposing Melanie's motion in State Court for an order vacating the order of attachment (and in response to the argument of Melanie's counsel that Kama Rippa's improper obtaining of the order of attachment was merely a ruse by which Kama Rippa was attempting to construct an artificial defense to reversion of the copyrights), Kama Rippa's counsel** asserted in an affidavit:

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* That Kama Rippa's alleged right to withhold royalties was a complete afterthought by Kama Rippa following the vacating of the order of attachment is further highlighted by the fact that this was never asserted as a defense by Kama Rippa in Kama Rippa's reply to Melanie's counterclaims. (358A-360A) For that reason Kama Rippa waived its right even to assert the defense. Rule 12(h), Federal Rules of Civil Procedure.

** Kama Rippa was represented in the State Court proceedings by the same law firm that represents Kama Rippa in the District Court and in this Court.

"Plaintiff [Kama Rippa] now holds approximately $80,000 of publishing royalties due defendants pursuant to the prior agreements between the parties. Plaintiff [Kama Rippa] is required to pay this money over to defendants' attorneys at the offices of Robert L. Casper, P. C. before September 23, 1973, and will do so." (17A; emphasis added).

b) In the same affidavit, Kama Rippa's counsel asserted:

"Time is of the essence. Defendants will be paid said $80,000 (of which $75,000 is owed plaintiff) in the upcoming week . . . ." (18A)

c) In another affidavit submitted in the same proceedings, Kama Rippa's counsel asserted:

"Your deponent has not yet been able to fathom the reason why partial tender of royalties due was not accepted by Melanie's alleged agents. No one has claimed that acceptance of such payment would be a waiver of any of Melanie's claims for the balance of royalties. We have in fact agreed that such royalties are due and owing and clearly stated that the only reason they were being withheld is because an Order of Attachment had been levied against them." (401A; emphasis added)

d) Kama Rippa's obtaining of the order of attachment was itself an admission that it had no contractual right to withhold payment of Melanie's royalties, for if Kama Rippa had any such contractual right to withhold royalties, no order

of attachment would have been necessary.

e) When the improper order of attachment was finally vacated, Kama Rippa delivered to Melanie her check for $79,436. If Kama Rippa was justified in withholding $75,000 because of Melanie's alleged breach, the vacating of the order of attachment would have been irrelevant, as Kama Rippa would still have been entitled to continue to withhold $75,000.

f) Subsequent to the royalty period in question (i.e., the semi-annual period ending June 30, 1973) but prior to Judge Knapp's opinion (dated June 17, 1974), another royalty period elapsed (i.e., the semi-annual period ending December 31, 1973). Pursuant to the Songwriter's Agreement, Kama Rippa was required to pay Melanie her royalties for that period not later than February 15, 1974. Kama Rippa was late in its payment, and Melanie's counsel sent a letter demanding payment of royalties. Kama Rippa thereupon paid the royalties.

g) Kama Rippa's commencement of this very action to recover the $75,000 is itself an admission of its obligation to attempt to enforce its alleged rights in a court of law, rather than through the unilateral and unauthorized act of

withholding royalties.

Thus, Kama Rippa, through an unbroken series of actions and admissions, has acknowledged that its contractual obligation to make timely payment of royalties to Melanie was not affected by Melanie's alleged breach of her obligation to "record" three compositions. Kama Rippa's statements and actions were deliberate, unambiguous, and made under guidance of its legal counsel. Under the authorities cited above, Kama Rippa's interpretation of the unconditional nature of its contractual obligations to make timely payment of royalties to Melanie is controlling.

POINT IV

THE FINDING OF FACT BY THE STATE COURT THAT KAMA RIPPA OWED MELANIE THE $75,000 IN ROYALTIES WHICH KAMA RIPPA WAS WITHHOLDING FROM MELANIE IS CONTROLLING IN THE FEDERAL ACTION UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL

As previously noted, the State Court granted Melanie's motion for an order vacating the order of attachment. In its memorandum opinion accompanying its order, the State Court set forth as a finding of fact the following:

> "The plaintiff [Kama Rippa] admittedly owes defendants approximately $80,000." (231A)

The doctrine of collateral estoppel precludes Kama Rippa from relitigating in federal court an issue fully and fairly litigated and resolved in state court (Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973)), and the finding of fact by the state court that Kama Rippa owed and admitted owing Melanie the moneys which Kama Rippa withheld from Melanie is binding upon Kama Rippa in the federal action. The controlling law in New York is clear: "Where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one." Schwartz v. Public Administrator of Bronx County, 24 N.Y.2d 65, 69 (1969).

POINT V

THE ORDER OF ATTACHMENT WHICH KAMA RIPPA CAUSED TO BE ISSUED AND LEVIED UPON ITSELF, AND WHICH WAS VACATED BY THE STATE COURT, AFFORDS NO DEFENSE TO KAMA RIPPA

Kama Rippa asserts (at "Point IV" of its brief) that its default in making timely payment of royalties to Melanie was excused by the order of attachment which Kama Rippa had improperly caused to be issued and levied upon itself. Judge Knapp properly held that Kama Rippa

"cites no New York case for the proposition that a party to a contract can provide itself with a defense of impossibility of performance by causing a Sheriff to serve a warrant upon itself. The reason that no such case is cited is that obviously no court would assert such a ridiculous proposition." (426A)

As previously noted, the order of attachment was vacated, on Melanie's motion (which was opposed by Kama Rippa), on the grounds that "there was no legal foundation for the order of attachment" (the State Court's opinion and order vacating the order of attachment are reproduced at pp. 238A-242A).

The general rule governing a case such as this has been stated as follows by the two leading treatises on the law of contracts:

> "Courts have held that a legal prohibition preventing performance is not a defense if the situation leading to the prohibition is attributable to the acts of the party asserting the defense." 6 Corbin, Contracts, § 1352.

> "No doubt if the legal proceedings interfering with performance of the promise are in any way due to the fault of the promisor, as an attachment or receivership to collect a debt or debts rightfully due by him, the interference should constitute no defense, not because it is not the act of the law, but because the impossibility is primarily due to the promisor's own fault, not to fortuitous circumstances beyond his control." 6 Williston, Contracts (Revised Edition) § 1939 (emphasis added).

Similarly, the Restatement of the Law of Contracts provides that a judicial order prohibiting performance of a contractual duty discharges the contractual duty only in the absence of "contributing fault on the part of the person subject to the duty." American Law Institute, Restatement of the Law of Contracts, § 458. "This section is in accord with New York law." American Law Institute, Restatement of the Law of Contracts, New York Annotations to § 458. The Restatement provides the following illustration:

> "A contracts with B to sell and to deliver to him a specific automobile on a certain day, time being of the essence. C, by false allegations of ownership of the machine, induces a court having jurisdiction to enjoin A from delivering the machine. In spite of diligent effort A is unable to secure dissolution of the injunction until it is too late to fulfil his contract with B. A's duty is discharged. If C had just grounds for obtaining the injunction, or <u>if A failed in diligent effort to secure its dissolution, A would not be discharged</u>." Restatement of the Law of Contracts, Illustration 3 to § 458.

This general rule is also stated in Corpus Juris Secundum:

> "The act of a party in voluntarily placing it out of his power to perform a contract on his part does not relieve him of liability for nonperformance, but constitutes a breach of the contract." 17A Corpus Juris Secundum, <u>Contracts</u>, § 470.

New York law clearly follows this rule:

> "Impossibility of performance of a contract which comes about through a default of the contracting party under the duty of performing is not excused where, through his failure to carry out his obligations, a governmental prohibition becomes applicable to and prevents performance of the contract. The rule that performance is excused where it is forbidden by judicial order does not apply where the fault of the party owing the performance contributed to the order, as where his fraud was its basis. 10 N.Y.Jur., Contracts, § 373 (p. 362; emphasis added).

> "[W]here a promisor is himself the cause of the failure of performance of a condition, he cannot set up such nonperformance as a defense. If a person binds himself to do certain acts which he afterward renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the acts which he can no longer perform." 10 N.Y.Jur., Contracts, § 381.

New York case-law--both as pronounced by the courts of New York and as interpreted by this Court--clearly adopts the above-cited rule and, as applied to the facts of this case, clearly precludes Kama Rippa from using the temporary existence of the Order of Attachment and Levy secured by Kama Rippa upon Kama Rippa itself as an excuse for its failure to comply with its obligation to pay Melanie her royalties on time.

In Varagnolo v. Partola Manufacturing Co., 209 A.D. 347 (1st Dept. 1924), aff'd 239 N.Y. 621, defendant contracted

to ship to plaintiff in Genoa, Italy, 1,000 tons of American caustic soda during June, 1917. Defendant failed to ship any caustic soda until August, 1917 when it shipped only 175 tons. In September, 1917, the Exports Administrative Board in the United States forbade all exports of American caustic soda without a license, and plaintiff's subsequent application for a license was rejected. The trial court dismissed plaintiff's complaint. The Appellate Division (in a decision unanimously affirmed by the Court of Appeals) unanimously reversed, holding:

> "If defendant had shipped according to its contract its goods would have been exported before this prohibition, and their departure would not have been interdicted. Thus the loss arising from the prevention of performance is put upon the person whose act was its legal cause, that is, upon defendant whose default was its neglect of its original duty of prompt shipment. Impossibility of performance which comes about through a default of defendant is not excused where through failing to carry out its obligations the prohibition becomes applicable to its contract." 209 App.Div. at 351 (emphasis added).

In Spanos v. Skouras Theatres Corporation, 364 F.2d 161 (2d Cir. en banc 1966), plaintiff was an out-of-state attorney retained by defendant in a federal anti-trust litigation. The defendant, before any court appearance became necessary in which plaintiff could be admitted to the Bar pro hac vice,

settled the case and discharged plaintiff. Plaintiff had already performed legal services for the defendant, however, and sued for legal fees. The original three-judge panel of the Court of Appeals that heard the case held in a 2-1 decision that plaintiff was barred from recovery because he had not been admitted to practice in the Southern District of New York. The appeal was reconsidered en banc, and the original panel's decision was reversed. This Court, in its en banc decision, held:

> "One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised.' 3A Corbin, Contracts § 767, at 540 (1960); E. I. DuPont de Nemours Powder Co. v. Schlottman, 218 F. 353 (2 Cir. 1914), cert. denied, 235 U.S. 705, 35 S.Ct. 382, 59 L.Ed. 434 (1915); George W. Garig Transfer, Inc. v. Harris, 226 La. 117, 75 So.2d 28 (1954); Wissahickon Realty Corp. v. Boyle, 385 Pa. 198, 122 A.2d 720 (1956); 5 Williston, Contracts § 1293A (rev. ed. 1937)." 364 F.2d at 169.

See also Pearlstein v. Scudder & German, 429 F.2d 1136, 1140, fn. 4 (2d Cir. 1970) ("Under New York law, a party to a contract who renders its performance illegal by his own fault appears to be liable for breach."). This well-established rule has also been applied by other federal circuits. See, e.g., Baumer v. Franklin County Distilling Co., 135 F.2d 384,

388 (6th Cir. 1943), cert. denied 320 U.S. 750. ("It has long been established law that one, who by his own action had rendered himself incapable of performing a contract, may not successfully plead impossibility of performance in defense of his breach.").

In Cheatham v. Wheeling & L.E.Ry. Co., 37 F.2d 593 (S.D.N.Y. 1930), plaintiff purchased preferred stock of the defendant corporation; the defendant's certificate of incorporation provided that preferred stock was convertible into common stock at any time after November 1, 1919. In 1920, an amendment to the Interstate Commerce Act was passed, requiring permission from the Interstate Commerce Commission for this type of stock conversion. On February 7, 1927, plaintiff sought common stock from the defendant in exchange for plaintiff's preferred stock. Only then did the defendant apply to the ICC for permission to make the conversion, although it had the right to apply to the ICC at any time after passage of the 1920 Act. The ICC granted permission on February 24, 1927. The corporation asserted a defense based on the intervening change in the law to plaintiff's action for defendant's refusal (because of the statutory prohibition) to make a timely conver-

sion of preferred stock into common stock. The Court held the defense to be legally insufficient because of defendant's failure to apply promptly to the ICC for permission for that type of stock conversion, holding:

> "[A] defense of a supervening illegality, which can be cured by proper steps taken on behalf of the party pleading it, is not a good basis for a claim of frustration, which in its essence is an equitable defense." 37 F.2d at 596.

In Schine- Oswego Corp. v. Trovato, et al., 191 Misc. 556, 76 N.Y.S.2d 639 (Mun.Ct. 1948), the plaintiff-lessor sued a tenant for unpaid rent on a liquor store. The tenant defended on the ground that performance was impossible because the tenant had surrendered his liquor license. The Court held for the plaintiff, on the ground that

> "It is well settled that a party who makes his performance of a contract impossible does not thereby discharge himself from liability. This is 'true of any kind of impossibility known to or foreseeable by the promisor, or caused by him'." 191 Misc. at 558, 76 N.Y.S.2d at 641.

In Seedman v. Friedman, 132 F.2d 290 (2d Cir. 1942), the claimant contracted with a debtor, prior to the debtor's bankruptcy, for the purchase by the claimant of certain of the debtor's assets. The purchase was to be closed at a future

date. Prior to the closing, the debtor was adjudged a bankrupt, and the sale was restrained by the Referee. Thereafter, the trustee in bankruptcy sold the bankrupt's assets to a third party; the claimant purchased the assets from the third party at a price in excess of the claimant's original contract price with the debtor-bankrupt, and sued the bankrupt for the difference. The District Court held for the bankrupt on the ground of the restraint imposed on the bankrupt by the Referee. This Court reversed, holding:

> "There has been much discussion in this case of the rule that performance of a contract is excused where it is forbidden by a judicial order. We shall not, however, go into that problem further than to say that the rule is not applied where the fault of the party owing performance under the contract contributed to the order." 132 F.2d at 226.

In Standard Oil Co. v. Central Dredging Co., 225 A.D. 407, 233 N.Y.S. 279 (3d Dept. 1929), aff'd 252 N.Y. 545, the defendant contracted to deposit on the plaintiff's land spoil dredged by the defendant during the course of the defendant's performance of a contract with the Government. The defendant requested permission from a government official to deposit the spoil where plaintiff requested, but the government official denied permission. The Appellate Division, in a decision

affirmed by the Court of Appeals, held for the plaintiff on the ground that

> "Defendant failed to show sufficient diligence in its effort to obtain the permit. It might, by negotiations, have overcome the objection of the division engineer . . . . It must be shown, to establish a defense under these conditions, that the thing cannot by any means be effected." 225 A.D. at 410, 233 N.Y.S. at 282.

In Dezsofi v. Jacoby, et al., 178 Misc. 851, 36 N.Y. S.2d 672 (Sup.Ct. 1942), plaintiff alleged a contract with the defendant; defendant asserted as an affirmative defense that because defendant was a foreign resident, performance was impossible under presidential executive order. Plaintiff's motion to strike the affirmative defense was granted, and the Court held:

> "[T]he defendant could have applied for a license to the Secretary of the Treasury, pursuant to the regulations, and it should have done so; the duty and obligation to deliver the stock rested on the defendant, as promisor, and 'so long as it lies within the power of the promisor to remove the obstacle of performance, legal impossibility of performance does not exist.' Brown v. J. P. Morgan & Co., 177 Misc. 626, 635, 31 N.Y. S.2d 323, 333. In the law of contract, where force majeure is offered as an excuse for non-performance, it is held that where the injunction, governmental or other restraint does not render performance absolutely impossible it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent his performance.' Brown case,

supra, 177 Misc., page 636, 31 N.Y.S.2d page 334. It is not enough, therefore, to merely assert impossibility of performance by reason of the executive order, but there should be an allegation of a bona fide attempt by defendant and that such attempt failed. This defense [as pleaded] is therefore stricken out. . ." 178 Misc. at 853, 36 N.Y.S.2d at 674 (emphasis added).

Innumerable other cases in New York have similarly held that a judicial or other governmental prohibition on a defendant's performance of a contractual duty is not a defense where the defendant either causes the prohibition to come about or fails to take reasonable steps to end the prohibition. In addition to the cases cited and discussed above, the Court is most respectfully referred to the following illustrative cases: Kooleraire Service and Installation Corp. v. Board of Education of the City of New York, 28 N.Y.2d 101 (1971); Gent v. Midtown Holding Corp., 10 A.D.2d 901, 200 N.Y.S.2d 281 (4th Dept. 1960); Murphy v. North American Co., 24 F.Supp. 471, 478 (S.D.N.Y. 1938) (holding that the above rule applies even where the defendant himself did not create the obstacle, where it was created by a third party but the defendant had the power to remove the obstacle); Patterson v. Meyerhoffer, 204 N.Y. 96 (1912).

The determinative applicability of the principle established by the foregoing cases to the case at bar is clear. The Order of Attachment and Levies were obtained at the specific application of Kama Rippa. Had it not been for Kama Rippa's actions, the Order of Attachment and Levies would never have occurred. It was within Kama Rippa's ability throughout the duration of the Order of Attachment and Levies to remove itself from their ambit--by not having obtained the attachment or, having obtained it, by consenting to Melanie's motion to vacate. But Kama Rippa wilfully continued in its default, far beyond the August 15, 1973 deadline for paying Melanie's royalties, and far beyond the 30-day deadline following Melanie's written demand for her royalties.

The three cases upon which Kama Rippa relies are entirely inapplicable to the instant case. In Flaster v. Seaboard Gage Corp., 61 N.Y.S.2d 152 (S.Ct. 1946), a national wartime executive order rendered illegal the defendant's manufacture of metallic dyes which defendant had agreed to manufacture for plaintiff; obviously, the defendant in Flaster was not responsible for the war, as Kama Rippa was here responsible for the Order of Attachment, and there was no legal way in which the defendant in Flaster could legally have avoided the

presidential prohibition of its use of metal (as Kama Rippa could have avoided the order of attachment by not having obtained it or by consenting to its being vacated when Melanie so moved in State Court). Similarly, in Hamilton Rubber Mfg. Co. v. Greater New York Carpet House, 47 N.Y.S.2d 210 (S.Ct. 1946), aff'd 53 N.Y.S.2d 954, 269 App.Div. 681, upon which Kama Rippa also relies, the defaulting party invoking the defense of legal prohibition did not cause the war; moreover, the defaulting party "made application to the War Production Board for permission to perform the contract but permission was refused" (47 N.Y.S.2d at 211). Precisely the opposite was true in the instant case, where Kama Rippa actively (and unsuccessfully) opposed Melanie's motion to vacate the Order of Attachment. Indeed, the Court in Hamilton Rubber Mfg. Co. relied on Mawhinney v. Millbrook Woolen Mills, 231 N.Y. 290 (1921), where the Court of Appeals, in sustaining a defense to a breach of contract cause of action where defendant's performance would have been illegal under the National Defense Act, noted, "it was not the defendant or its officials who created the situation." 231 N.Y. at 300. In Lorillard v. Clyde, 142 N.Y. 456, 466 (1894), judgment was directed against the plaintiff, who was suing for breach of contract, because the plaintiff had

been the "active promoter" of the defendant's inability to perform the contract. Kama Rippa's reliance upon that case is therefore similarly misplaced.

Under the cases discussed above, it is respectfully submitted that even if the Order of Attachment had been proper and had not been vacated by Order of the State Court, its temporary existence would not excuse Kama Rippa's non-performance. It is also respectfully submitted, as an additional reason for this Court to reject Kama Rippa's position, that by virtue of the State Court's vacating the Order of Attachment, the parties are restored to the same position as if the Order of Attachment had never been issued.

> "A void writ [of attachment] furnishes no justification for acts done under it and it is not necessary that it should be set aside before bringing an action. If a writ is irregular only, no action lies until it has been set aside, but when set aside, it ceases to be a protection for acts done under it. . . . [An order of attachment] having been set aside as irregular, it afforded no justification, afterwards, for acts previously done under it, to the party in whose favor it was issued." Siegel v. Northern Boulevard & 80th Street Corp., 31 App.Div.2d 182, 184, 187, 295 N.Y.S.2d 804, 807, 810 (1st Dept. 1968).

See also Lawlor v. Magnolia Metal Co., 2 App.Div. 552, 554 38 N.Y.S. 36, 38 (1st Dept. 1896), appeal dismissed 149 N.Y.

591 ("the effect of an order or judgment vacating the attachment is an adjudication that the property was illegally seized"); Weintraub v. Fitzgerald Bros. Brewing Co., 40 F.Supp. 473, 475 (S.D.N.Y. 1941) (holding, in an action by a trustee in bankruptcy based upon an order of attachment--subsequently vacated--obtained before the debtor became a bankrupt, "on the date of the unlawful taking the bankrupt acquired a right of action in tort"); Minskoff v. Fidelity, 28 A.D.2d 85, 281 N.Y.S.2d 410 (1st Dept. 1967), aff'd 23 N.Y. 2d 706 (an order vacating an order of attachment "finally determine[s] that there was no right to the attachment which was obtained"). Moreover, as noted supra, page 14, Kama Rippa did not even attempt to comply with the "Order of Attachment" which it caused to be levied upon itself. Kama Rippa simply disregarded the Order of Attachment. Nothing could more clearly prove that Kama Rippa was simply attempting to misuse the State Court's process.

POINT VI

KAMA RIPPA IS NOT ENTITLED TO ANY "REIMBURSEMENT" BY MELANIE FOR ALLEGED EXPENSES

Kama Rippa claims (at Point V of its brief) that the District Court erred, in its Order denying Kama Rippa's motion for modification of the Court's "Order and Judgment", by not granting Kama Rippa "reimbursement" for alleged expenditures incurred in connection with the copyrights. This contention is frivolous.

Kama Rippa did not assert anywhere in its pleadings its alleged right to "reimbursement" for expenditures*, and thus the issue was never even properly before the Court. Kama Rippa asked for such "reimbursement" only by motion, made after the Court had entered its "Order and Judgment". Even then, the claim was based wholly on conclusory assertions without the slightest showing of any evidence whatever (448A-449A), and thus was properly rejected on that ground alone.

The plain reason for Kama Rippa's failure to assert in a timely manner any such claim for "reimbursement" is that there is absolutely no contractual basis for the "reimbursement" Kama Rippa belatedly seeks. The Songwriter's Agreement

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* See Kama Rippa's Reply to Melanie's counterclaims, 358A-360A.

contains no such provision; the Court's Order and Judgment merely granted specific enforcement of the reversion clause in the Songwriter's Agreement as provided by that contract. Moreover, simultaneously with the execution of the Songwriter's Agreement, Kama Rippa (and its affiliate) and Melanie (through her two partnerships, Amelanie Music and Two People Music) entered into a "Co-Publishing Agreement" (a copy of this Co-Publishing Agreement is reproduced in the "Supplemental Appendix"). Pursuant to paragraph 5 of the Co-Publishing Agreement, Kama Rippa has been reimbursed for expenditures throughout its administration of the copyrights, and these reimbursements have been taken out of moneys received by Kama Rippa prior to the payment of royalties by Kama Rippa to Melanie. Moreover, Kama Rippa has already profited by the alleged increased value of the copyrights, through its share of royalties previously obtained, which was not affected by the Court's Order and Judgment. In short, Kama Rippa has already been reimbursed for, and has already profited from, all the "expenditures" for which it now seeks reimbursement.

POINT VII

NO EQUITABLE GROUNDS EXIST FOR REVERSAL OF THE DISTRICT COURT'S ORDER

Kama Rippa argues (at Point VI of its brief) that equitable considerations justify reversal of the District Court's Order. To the contrary, it is respectfully submitted that Kama Rippa's actions in this case constituted a gross breach of contract, accompanied by a flagrant abuse of legal process, and that all equitable considerations fully justified the District Court in giving effect to the plain meaning of the rider to paragraph 6 of the Songwriter's Agreement. Kama Rippa embarked upon a course of conduct in State Court in which it deliberately concealed from a Judge of the State Court the pendency of this Federal action when making its application for the Order of Attachment, obtained the Order of Attachment without any foundation in law, and then completely failed to comply in any respect with the sham Order of Attachment which it had caused to be levied upon itself. It was Melanie who had to bear the financial and other burdens of that improper Order of Attachment for several months. Because of Kama Rippa's default, Melanie and her producer-husband were required to apply to Paramount Records for a substantial advance on royalties; were unable to make timely

payment on an outstanding bank loan at the Manufacturers Hanover Trust; were forced to cancel and reschedule several recording sessions because of inability to pay the studio; were unable to pay musicians on time; and were unable to make timely payments to other creditors (350A-357A). Moreover, Kama Rippa at no time has suggested that it was financially unable to pay Melanie her royalties on time. A royalty payment covers six months, and Kama Rippa's default for over three months should be evaluated in that context. The law permits parties to enter into contracts providing for forfeitures in the event of non-compliance, and such provisions will be enforced in equity. Industrial Dev. Found. v. United States Hoffman Machinery Corp., 11 Misc.2d 625, 171 N.Y.S.2d 562, aff'd 8 A.D.2d 579, 183 N.Y.S.2d 1011 (4th Dept. 1959); Sunset Securities Co. v. Coward-McCann, Inc., 47 Cal.2d 907, 306 P.2d 777 (Sup.Ct. of Cal. (en banc) 1957); DeMille Co. v. Casey, 115 Misc. 646 (Sup.Ct. 1921).

Judge Knapp, in response to Kama Rippa's attempted appeal to "equitable considerations" in the District Court, held:

> "Kama's conduct hardly commends itself to equitable considerations. Where a corporation, acting under legal advice, deliberately embarks upon a campaign of brinkmanship, equity is hardly likely to step in to protect it from the consequences of

failure simply because it has miscalculated the odds." (427A)

It is respectfully submitted that the Court's holding was clearly a proper exercise of the Court's discretion, fully justified under the circumstances of this case.

CONCLUSION

For the above reasons, it is respectfully submitted that the "Order and Judgment" of the Court below dated July 16, 1974, and the further Order of the Court below denying appellant's motion to set aside or modify the "Order and Judgment", should be in all respects affirmed.

Respectfully submitted,

Sandor Frankel

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Attorney for Appellee

No. 74-2153

KAMA RIPPA MUSIC INC.,
Plaintiff-Counterdefendant-Appellant,
v.
MS. MELANIE SCHEKERYK,
Defendant-Counterclaimant-Appellee

BRIEF FOR APPELLEE
AND
SUPPLEMENTAL APPENDIX

AFFIDAVIT OF MAILING

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, RICHARD FRANKS, being duly sworn, deposes and says: that he is over twenty-one years of age; that he served the above captioned matter by depositing 2 true copies on the 20th day of November 1974 of said Brief for Appellee and Supplemental Appendix, duly enclosed in a postpaid and sealed wrapper, certified mail, return receipt requested, in an official post-office duly maintained and operated by the Government of the United States at Church Street Station, Borough of Manhattan, New York City, and addressed to:

Emil Kobrin Klein & Garbus, Esqs.
540 Madison Avenue
New York, N.Y. 10022

that being the address within that State designated by them on the previous papers in this action as the place where they then kept an office for the regular transaction of business, between which places there then was and now is regular communication by mail.

Richard Franks

Sworn to before me this 20th
day of November, 1974.

JAY FRANKS
My Commission Expires May 18, 1978
Notary Public of New Jersey